SINGAPORE REPORTS

OLIVER HENNEDIGE v. PUBLIC PROSECUTOR

[A. Cr. J. (Lai Kew Chai J.) September 18, 1985]

[Singapore – Magistrate's Appeal No. 83 of 1984]

Criminal Law and Procedure – Dental surgeon charged for using premises as an unregistered factory – Whether technicians "employed in manual labour" – Factories Act, 1973, ss. 5(1), 9(1) & 88(2) – Criminal Procedure Code (Cap. 113), s. 370.

Factories – Premises used as unregistered factory – Technicians "employed in manual labour" – Factories Act, 1973, ss. 6(1), 9(1) & 88(2).

Labour Law – Using premises as unregistered factory – Factories Act 1973, s. 6(1).

The appellant a dental surgeon and the sole proprietor of Oliver Dental Surgery, was convicted of having used the premises at 294 Tanjong Katong Road, Singapore ("the premises") as an unregistered factory contrary to and punishable under section 9(1) of the Factories Act, 1973 ("the Act"). He was sentenced to a fine of $1000 or, in default, one month's imprisonment.

The appellant employed two dental technicians to manufacture dentures on the premises. He conceded that the prosecution had made out all the ingredients of a "factory" so far as the premises were concerned, but disputed that the technicians were "employed in manual labour" within the meaning of that expression in section 6(1) of the Act. He appealed against his conviction as not all the ingredients of the charging section have been made out.

Held, dismissing the appeal: (1) what is "manual labour" is a question of law and, in approaching the construction of the words in the Act, it is neither helpful to be emotional nor permissible to allow ourselves to be a prisoner of the colloquial usage and meaning of the words "manual labour";

(2) the application of the Act is not limited to unskilled manual labour. Skilled manual labour is not exempted;

(3) on the facts as found by the learned District Judge it is tolerably clear that the two dental technicians in this case were employed in manual labour and, accordingly, the premises where they had worked was a factory.

Cases referred to:

(1) *J. and F. Stone Lighting and Radio* v. *Haygarth* [1968] A.C. 157.

(2) *Appeal of Gardner; Re Maschek; Re Tyrrell* [1938] 1 All E.R. 20.

MAGISTRATE'S APPEAL.

Joseph Grimberg for the appellant.

Tan Teow Yeow (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lai Kew Chai J.: The appellant, Oliver Hennedige, a dental surgeon and the sole proprietor of Oliver Dental Surgery, was convicted by District Court No. 16 of having used the premises at 294 Tanjong Katong Road, Singapore ("the premises") as an unregistered factory contrary to and punishable under section 9(1) of the Factories Act, 1973 ("the Act"). He was sentenced to a fine of $1,000 or, in default, one month's imprisonment. Being dissatisfied with the decision of the learned district judge, the appellant brought this appeal before the High Court.

The sole question canvassed before me was whether the two dental technicians employed on the premises in the manufacture, principally of dentures, were "employed in manual labour" within the meaning of that expression in section 6(1) of the Act. Save and except the sole question in issue in this appeal, the appellant has at all material times conceded that the prosecution had made out all the ingredients of a "factory" so far as the premises were concerned. It was therefore conceded that the prosecution had proved (a) that the two denial technicians were employed; (b) that they were employed in the making of an "article" designated in section 6(1)(a) of the Act; (c) that the work carried on in the premises was carried on by way of trade or for the purposes of gain; and (d) that the premises were premises to or over which the appellant as the employer of the two dental technicians had the right of access or control.

It was also undisputed at the trial that by virtue of section 88(2) of the Act the burden was on the appellant to prove that the premises were not a factory and that the standard of proof required of the appellant was no higher than proving on a balance of probabilities.

At the trial both the prosecution and the defence very properly and sensibly took advantage of the procedure laid down in section 370 of the Criminal Procedure Code and accordingly adduced a large part of the evidence by way of written statements of witnesses, subject to the right of each side to cross-examine the other's witnesses on their statements. In this way, the prosecution tendered seven statements and the defendant three.

According to the evidence of Mr. Soh Hon Poh, a Technical officer attached to the Factory Inspectorate of the Ministry of Labour who inspected the premises on two occasions, the premises consisted of four surgery rooms and one

workroom. The premises had a waiting area which began from the entrance of the surgery, abutting the four surgery rooms and the workroom. The appellant and three other dental surgeons under his employment, including Mr. K. Kunaratnam, worked in the four surgery rooms. The workroom, which was air-conditioned, was used to make acrylic dentures. The appellant employed two dental technicians, Ang Seng Hock and Kong Chein, a deaf mute, to fabricate dentures.

Inside the workroom were found two Bunsen burners, two electrically powered dental lathes for polishing and grinding, two electrically powered and hand-held trimmers, a bottle of acrylic monomer liquid, a bottle of acrylic polymer powder, a manual press, some handpieces, a couple of wax sheets, plaster models, dentures, flasks and boxes of false teeth. At the back of the premises were found two air receivers. Air lines were connected from the air receivers to the surgery rooms. Several photographs of the premises and of the equipment were tendered in evidence.

Mr. K. Kunaratnam was one of the dental surgeons working for the appellant at the premises, having joined him in January 1979. In his statement, he stated that when patients required dentures he would obtain the impression using stock trays and the alignment specifications. He would then pass to the dental technician, Ang Seng Hock, the impression model and would also give him instructions on how to work on it. With the models made by Ang, he would fit them on patients. After each fitting, he would also instruct Ang on any changes that had to be made. It appeared that in the case of a partial denture there would be a further fitting using a wax tray.

In his cross-examination, it was elicited that a dental technician would apply his knowledge of non-clinical prosthetic dentistry which is a part of the art and science of designing and fitting artificial substitutes for teeth. It is knowledge which a dental surgeons himself might have to apply if he did not employ a technician and preferred not to send his denture work to an outside laboratory. It also emerged in cross-examination that a dental technician is obliged to cater for a patient's needs in their functional, aesthetic and even on emotional aspects. But as regards the aesthetic and emotional factors, it has to be stated that from the evidence it is fairly evident that, in those areas, the role of the dental surgeon is unquestionably pivotal. It is the dental surgeon who sees the patient, carries out the trial fittings, orders the changes (if any) and finally gives his professional stamp of approval to the dentures.

For the purposes of interpreting the law in question, it is necessary to describe in greater detail the nature of the work of the dental technicians and the relationship of their work to that of the dentists. Both groups are engaged in that aspect of dentistry (which of course covers a much wider field) which deals with the replacement of missing teeth and tissues in the mouth. It is called 'prosthetic dentistry' and is divided into fixed prosthesis and removable prosthesis; the former involves artificial teeth which are fitted on a permanent basis in the mouth, such as inlays, crowns and bridges and the latter involves the designing and fixing of dentures which could be either partial or full.

Additionally, there are two aspects to prosthetic dentistry: clinical and non-clinical. The dental technician, I understand, is only concerned with the latter, although, as I had said earlier, his work must be seen and evaluated in the context of prosthetic dentistry.

Broadly speaking, clinical prosthetics, which is done by the dentist, concerns the preparation of the patient's teeth for the taking of the necessary impressions and bite registrations. The non-clinical or laboratory aspects follow and, in a sense, respond or adjust to the needs of the earlier stage.

I will now take a closer look at the work of the dental technicians and may conveniently begin with the work involved in the making of partial dentures, that is, dentures in cases where not all teeth are missing. In writing this part of the judgment, I find the descriptions of the appellant's counsel too apt not to follow the narrative closely. To begin with, the dentist must take a positive impression of the patient's mouth in plaster of paris. The model, in which the protrusions represent the teeth, is given to the technician together with the dentist's instructions on the shade of the teeth. For the shape and size of the teeth, the technician has the model protrusions as a guide. Where the partial dentures are substantial, or where there are very few teeth on the model, the technician will design the denture teeth on the basis of the sex of the patient. It appears that male teeth are generally sharper and bigger while female teeth are smaller and dainty.

A dentist has a substantial stock of false teeth manufactured out of plastic or porcelain. In design-

ing a denture, the technician selects a corresponding shape, size and shade out of the stock and if the shade does not match he will mix powder and liquid to obtain the proper shade.

The next step is for the technician to set up the selected and, where necessary, modified teeth on a base of wax. This is a temporary base as the final base is made of acrylic. After adjusting and positioning the teeth on wax, he then puts the model (teeth and all) onto an "articulator" – that is, a model jaw. At this stage of his work, the technician wants to achieve the best "centric" and "accentric" relationships for the dentures – that is, the teeth must bite properly and must not protrude into the cheek area.

The model is thereafter handed to the dentist who will fit and test the model for (a) aesthetics, whether the dentures blend or merge with the teeth; (b) centric and accentric relationships; and (c) overall appearance and compactibility as one cannot have, for example, a petite patient wearing oversized artificial teeth.

Once both patient and dentist are satisfied, the wax model is sent back to the technician with instructions, specific or otherwise, on the questions of "retention" or the method to be used to retain the dentures in the patient's mouth. The simplest method of retaining the teeth is to clasp the false teeth to the existing teeth by the use of wires. Having found the right clasp, the technician has to ascertain "the correct path of insertion" for the partial dentures. The next step is for the technician to "flask" the model. It is a mechanical process involving acrylic, at the end of which is a semi-finished denture. Excess acrylic is then trimmed by means of the dental motor, smoothened and polished to a fine shine. The polishing is done by using the polisher/lathe and pumice (volcanic ash).

I now turn to the making of full dentures by the technicians. The dentist takes an impression of the patient's mouth, which is in this case toothless, by the method and material similar to those employed in the case of a partial denture. This "primary impression" gives the dentist and the technician a rough guide of the shape of the patient's mouth and musculature. The dentist also gives the technician a set of instructions. With the impression and the instructions, the technician has to design a special tray which is then inserted into the patient's mouth for fitting. Once it fits, an impression mixture is poured into the tray which is inserted once again. The resulting impression (the secondary impression) represents more accurately the patient's cheek area and the region between the cheek and the gums.

The technician takes this negative impression and, with the use of plaster of paris, obtains a positive impression. From this, a wax base with a bite rim is designed to fit the ridge and/or the palate. The patient is then called in and the dentist registers certain indications on the bite rim that the technician can interpret and translate into reality.

To obtain the bite registration, the dentist has to do the following:

(a) he trims the upper and lower bite rims so that the original relationships (centric and accentric) are obtained;

(b) he examines the patient's pupils to ascertain the space between one canine tooth and the other;

(c) he indicates on the rim the number of teeth that should be exposed, bearing in mind that normal persons have, at least, 1 to 15.5 millimetres of teeth exposures; and

(d) he notes down the patient's preference on (c) above, and the size, shape and shade characteristics which he passes on to the technician.

On receipt of the wax base with bite rim, the technician puts it into the articulator and makes the necessary adjustments. He studies the shape of the jaw – V-shaped, U-shaped or curved – and makes the necessary adjustments. Secondly, he studies the shape of the ridge and palate and ascertains how high or low it is and makes the necessary adjustments.

The technician then sets the teeth into place. The setting of the teeth will depend on the configuration of the upper and lower jaw which, in turn, determines the patient's bite. The next stage involves curing the teeth so that they blend with the jaw – both in its movements frontwards and backwards and in its side to side movements. Once that is accomplished, the technician has to tackle the question of retention. Most full dentures are placed either a bit forward of or inside the ridge so that it is comfortable to the patient. The technician has to use the articulator again.

In setting the teeth and balancing the retention of the full dentures in a patient's mouth, the

technician has to assist the dentist in achieving the three-fold objectives of aesthetics, function and balance.

Before I leave the description of the work of the technicians, I should mention two other matters. The learned district judge in considering the work of the technicians had summarised the description of the technician, Ang Seng Hock. One gets the perception of the technician so far as the nature of his work is concerned. I have taken almost entirely the description of the processes of the appellant's counsel in his submission made below. I have done so because it is difficult to improve upon counsel's description and also because we will now have two descriptions and, I think, in that way one has a fuller picture of the kind of work of the technicians that was carried out in the premises. The second matter I would like to refer to is that there was some separation in the tasks of the two technicians in the premises. Most of the polishing, grinding, trimming, boiling, spreading of powder and paste was done by the deaf mute, Kong Chein. According to Ang Seng Hock, Kong Chein would occasionally make under his supervision simple partial dentures involving a few teeth. Full dentures or difficult partial dentures were made by Ang Seng Hock. It is clear that Kong Chein's work was more rudimentary. I mention this and also the photographs taken of the premises to convey the fullest possible picture of the premises and the type and different tasks of the two technicians. Perhaps, it is convenient to underline the fact that even Ang Seng Hock had to work under the supervision of the appellant and his dentists and that the more difficult tasks of making crowns, bridges and inlays were farmed out to commercial laboratories.

I now return to the sole question for my determination whether the two technicians were "employed in manual labour" within the meaning of that expression in section 6(1) of the Act. Its English equivalent is in section 175 of the English Factories Act, 1961. The meaning of "manual labour" has been discussed in many English cases. They are all looked by the House of Lords in *J. and F. Stone Lighting and Radio* v. *Haygarth*[1] (hereinafter referred to as *"Stone's* case"). In *Stone's* case, the engineer who diagnosed faults in radio and television sets in the circumstances of that case was by a majority of three Law Lords held to be employed in manual labour. It was held that the engineer was employed to do the work with his hands albeit it was work of a nature that required the application of knowledge and therefore some intellectual effort in its performance but it did not involve the exercise of a creative or artistic faculty, nor could it be said that the work involved mental qualities.

Stone's case, like the case I have to consider, have given rise to problems of interpretation because they are cases where the work which a person has been employed to do is partly work to be done with the hands and partly work not to be done with the hands. Lord Morris of Borth-y-Gest in *Stone's* case suggested the answer at page 176E. He said in his speech:

> "There is, I think, a clear and unbroken line of authority to the effect that in such a situation regard must be had to what is the main substantial work which a person is employed to do."

At page 177F in *Stone's* case, his Lordship went on to explain further the test so laid down. He said:

> "If someone is employed partly in manual labour and partly in non-manual labour it will often become necessary to consider whether one part of the employment is merely subsidiary or incidental to another part which is the main or substantial part. There will be questions of fact. They will often be questions which are borderline and difficult to resolve. There are few employments which do not in some way involve some use of the hands in the performance of duties involved. Those who in various capacities are employed to evolve policies, to reach decisions, to direct affairs or to guide and supervise others may all at certain moments need the use of their hands. Yet in so many cases the use of the hands would be of so incidental and subsidiary a nature that on a common sense approach a decision could readily be reached that there was no employment 'in manual labour.' "

Further light may be shed on the question before me if one looks at the contrasts between manual and non-manual labour which Branson J. brought into sharp focus in *Appeal of Gardner; In re Maschek; In re Tyrrell*[2]. The question which arose for consideration in that case was whether under the English Unemployment Insurance Act, 1935, the employment of certain modellers was "employment otherwise than by way of manual labour". Although the statutory words under consideration in that case were differently cast, the core concept of manual labour was not different in principle and therefore the pronouncements of Branson J., which were approved by the majority in *Stone's* case in a context similar to that in this case, are, in my view, most helpful for our guidance. The work of the modellers was to mould clay into ornaments and other objects according to their employer's instructions. They were given

photographs and working drawings which they were to follow. Branson J. held that the substantial nature of their employment was by way of manual labour. He focused on the difference between employments which are substantially for manual labour (whether or not involving heavy physical exertion) and employments of a different nature in which some manual labour is included.

Branson J. would not have regarded the employment as one "by way of manual labour" if one finds "a man employed because he has the artistic faculties which will enable him to produce something wanted in the shape of a creation of his own, then obviously, although it involves a good deal of manual labour, he is employed in order that the employer may get the benefit of his creative faculty."

On the other hand, the learned judge has regarded the employment as "by way of manual labour" the case of one employed because he had the manual dexterity necessary to make him "a suitable tool in his employer's hand to produce something which (the employer) has in his mind, and which he wants created, and which if he had the manual dexterity and the time, he would create himself."

Applying these pointers of construction gathered together in *Stone's* case, I am of the view that on the facts as found by the learned District Judge it is tolerably clear that the two dental technicians in this case were employed in manual labour and, accordingly, the premises where they had worked was a factory. I am in agreement with the learned District Judge in his view that the dental technicians had not created any full or partial dentures as creations of their own and that they had produced, albeit with great manual dexterity, such dentures from the impressions made and the instructions given by the dental surgeons who, together with the patients, always had the final say as to the aesthetic, functional and emotional acceptabilities of the dentures.

I have given anxious consideration to the expert evidence given by Professor John Alfred Jansen on the nature of the work of dental technicians. I accept all he has said about the artistic skills and aesthetic qualities required in non-clinical prosthetic dentistry. But what is "manual labour" is a question of law and, in approaching the construction of the words in the Act, it is neither helpful to be emotional nor permissible to allow ourselves to be a prisoner of the colloquial usage and meaning of the words "manual labour". Dr. Kunaratnam's idea that manual labour connotes someone who uses a shovel is an example of a piece of colloquialism. To hold that the dental technicians were employed in manual labour for the purposes of a piece of social legislation does not, in my view, detract from the skilfullness of the technicians. The application of the Act is not limited to unskilled manual labour. Skilled manual labour is not exempted. As has been seen, in law, an engineering technician has been regarded as employed in manual labour.

Perhaps, it is not inappropriate to remind ourselves that the Act is a piece of social legislation designed to ensure the health, safety and satisfactory conditions of work for our workers. In this context the words of Lord Morris of Borth-y-Gest in *Stone's* case at page 179E-180B/C are particularly apposite:

> "In legislation in relation to those employed in manual labour it would seem reasonable to suppose that the legislature was contemplating those whose work involved to a substantial extent the use of their hands. If manual labour denotes working with the hands I can find nothing in the Act which requires that the work must be heavy work which demands great strength. Some manual labour may require much strength: other manual labour may require but little. Similarly there may be manual labour which requires much knowledge: other manual labour may require but little. Some knowledge may be generally possessed by most people: some knowledge may be specially possessed by a few. Furthermore that which yesterday was the special knowledge of the few may tomorrow be the commonplace knowledge of all. The Act neither prescribes nor defines any varieties of manual labour. If, therefore, someone is employed to work with his hands so that in a realistic way it can be said that such work with his hands forms his main or predominant activity (as opposed to work with his hands which is merely incidental to or accessory to work which is not so done), then he would be employed in manual labour. He would still be so employed even if his work required knowledge or skill or ability. The Act is not limited to unskilled manual labour. There is no exemption for skilled manual labour. Were it so the Act might cease to operate in some of the very places for which its provisions would seem to be appropriate."

For all the foregoing reasons, the appeal is dismissed.

Appeal dismissed.

Solicitor: *Drew & Napier.*